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Attorneys for Plaintiff  
DEL MAR SEAFOODS, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DEL MAR SEAFOODS, INC. ) Case No.: CV 07-02952 WHA  
Plaintiff, )  
vs. )  
BARRY COHEN, CHRIS COHEN (aka )  
CHRISTENE COHEN), *in personam* and )  
F/V POINT LOMA, Official Number )  
515298, a 1968 steel-hulled, 126-gross ton, )  
70.8- foot long fishing vessel, her engines, )  
tackle, furniture, apparel, etc., *in rem*, and )  
Does 1-10, )  
Defendants. )  
And Related Counterclaims )  
DECLARATION OF MAX L. KELLEY IN SUPPORT OF PLAINTIFF'S EMERGENCY APPLICATION FOR AN ORDER STAYING ORDER VACATING ARREST

J. Max L. Kelley hereby declare:

1. I am an associate in the firm of Cox, Wootton, Griffin, Hansen & Poulos, LLP, attorneys of record for Plaintiff Del Mar Seafoods, Inc. ("Del Mar"). I submit this

1. I am an associate in the firm of Cox, Wootton, Griffin, Hansen & Poulos.

LLP, attorneys of record for Plaintiff Del Mar Seafoods, Inc. ("Del Mar"). I submit this

11. I am a member of the Board of Directors of Mutual Scarabas, Inc. ("Mutual"). I submit this

1 declaration in support of Plaintiff Del Mar's Emergency Application for an Order Staying this  
 2 Court's Order Granting Defendants' Motion to Vacate the Arrest of the Vessel F/V POINT  
 3 LOMA. I have personal knowledge of the facts stated below and if called to testify regarding  
 4 those facts, I could and would competently testify thereto.

5       2. On Monday, August 20, 2007, at approximately 9:15 p.m., right before I e-  
 6 filed Plaintiff's Emergency Application for a Stay of the Court's Order Vacating the Arrest  
 7 with this Court, I faxed and e-mailed to defendants' counsel, James P. Walsh, at (415) 276-  
 8 6599, and budwalsh@dwt.com, a copy of plaintiff's papers (without Exhibit A). Attached to  
 9 this declaration as **Exhibit A** are true and correct copies of the fax confirmation and my e-  
 10 mail to Mr. Walsh.

11       3. Attached to this declaration as **Exhibit B** is a true and correct copy of the  
 12 Promissory Note underlying plaintiff's claims.

13       4. Attached to this declaration as **Exhibit C** is a true and correct copy of the First  
 14 Preferred Ship's Mortgage underlying plaintiff's claims.

15       5. Attached to this declaration as **Exhibit D** is a true and correct copy of the  
 16 Declaration of Barry Cohen in Support of Defendants' Motion to Vacate Arrest.

17       6. Attached as **Exhibit E** is a true and correct copy of California Civil Code  
 18 section 1479.

19       7. Attached to this declaration as **Exhibit F** is a true and correct copies of an e-  
 20 mail I received (as a "cc") from Gregory W. Poulos of this law firm, requesting proof of  
 21 insurance from defendants and of the e-mail I received (as a "cc") from defendants' counsel,  
 22 Mr. Walsh, in response stating that such proof would be provided "in the near future."

23  
 24       I declare under penalty of perjury under the laws of the United States of America that  
 25 the forgoing is true and correct. Signed on August 20, 2007 at San Francisco, California.

26  
 27  
 28

  
 Max L. Kelley

COX, WOOTTON,  
 GRIFFIN, HANSEN  
 & POULOS LLP

190 THE EMBARCADERO  
 SAN FRANCISCO, CA  
 94105  
 TEL 415-438-4600  
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DelMarSeafoods/2504

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TRANSMISSION REPORT  
\*\*\*\*\*(MON) AUG 20 2007 21:35  
COX, WOOTTON, GRIFFIN, HANSEN&POULOS, LLP

DOCUMENT #	TIME STORED	TIME SENT	DURATION	PAGE (S)	MODE	RESULT
4861698-841	8. 20 21:18	8. 20 21:18	17' 24"	50	G3	OK

DESTINATION	DST. TEL #
2766599-2504	2766599-2504

## Cox, Wootton, Griffin, Hansen &amp; Poulos, LLP

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 RICHARD C. WOOTTON\*  
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 GREGORY W. POULOS  
 FREDERICK J. CARR  
 MARC T. CEFALU  
 MIA C. PERACCHIOTTI  
 GERMACK  
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**FACSIMILE COVER SHEET**Date: **August 20, 2007**

To:

James P. Walsh      Davis Wright Tremaine LLP      415 276-6599

From: **Max L. Kelley**No. of Pages: **50 (including cover sheet)**Re:      Case      *Del Mar Seafoods, Inc. v. Cohen et al.*  
             Our Ref.      **Del Mar Seafoods Point Loma/2504****COMMENTS:**

Please see the attached documents.

**EXHIBIT A**

Max L Kelley  
08/20/2007 09:24 PM

To: budwalsh@dwt.com  
Subject: Del Mar Seafoods v. Cohen

Mr. Walsh,

Please see the attached documents we are filing with the Court:



Emergency Application for Stay.pdf



MLK Dec. ISO App. for Stay.pdf



[Proposed] Order Granting Stay.pdf

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\*\*\*\*\*

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From: 44361471  
05/15/2007 11:55 5622152960Page: 15/15 Date: 6/6/2007 6:18 PM  
RICHARD P WAGNER

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**COPY**FEDERAL VESSEL DOCUMENTATION OF  
USCG  
RECEIVED/FILEDPROMISSORY NOTE

20 APR '04 10:08,

RECORDED: BOOK \_\_\_\_\_ PAGE \_\_\_\_\_  
DOCUMENTATION OFFICER \_\_\_\_\_

For the value received, BARRY COHEN and CHRIS COHEN, an individual of 2028 Draydon Avenue, Cambria, California 93428, hereinafter referred to as maker, promises to pay to the order of DEL MAR SEAFOODS, INC., 331 Ford Street, Watsonville, California 95076, its successors and assigns, hereinafter referred to as holder, the sum of two hundred fifteen thousand (\$215,000.00) dollars at the rate of seven (7) percent per annum, as follows:

Monthly payments of \$3,000.00 or fifteen (15) percent of the gross landing receipts of each and every landing of seafood product made by the fishing vessel POINT LOMA, whichever is greater, commencing on January 1 and on the 15th day of each succeeding month until principal and interest are fully paid. Payments are to be applied to interest first.

1. This promissory note is secured by a First Preferred Ship Mortgage on the vessel  
POINT LOMA, Official No. C 1 4 5 1 5 2 9 8 dated 10/31/03.

2. Incorporation of Terms of First Preferred Mortgage.

This note is secured by a continuing security interest in the vessel described in a Preferred Mortgage, dated 10/31/03, executed by maker in favor of holder. The terms of that Preferred Mortgage are incorporated into this note by reference to the same effect as if set forth in this note in their entirety. On default, under Preferred Mortgage or under this note, holder may exercise any of the remedies granted by the Preferred Mortgage. Maker acknowledges that holder rights are cumulative.

3. Acceleration of Maturity.

In the event of default, in the payment of any of the installments or interest due as provided in this

**EXHIBIT B**

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05/16/2007 11:55 562216260 RICHARD P WAGNER

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note, time being of the essence, holder may, without notice or demand, declare the entire principal sum then unpaid immediately due and payable. Further, if maker should at any time fail in business or become insolvent, or commit an act of bankruptcy, or if any writ of execution, garnishment, attachment, or other legal process is issued against any deposit account or other property of maker, or if any assessment for taxes against maker, other than taxes on real property, is made by the federal or state government, or any department or agency of the federal or state government, or if maker fails to notify holder of any material change in their financial condition, all of the obligations of maker shall, at option of holder, become due and payable immediately without demand or notice.

**4. Modification of Terms.**

Holder may, with or without notice to maker, cause additional parties to be added to this note, or release any party, or revise, extend, or renew the note, or extend the time for making any installment provided for in this note, or accept any installment in advance, all without affecting the liability of maker.

**5. Attorney's Fees.**

If suit is commenced on this note, maker shall pay to holder a reasonable attorney's fee and all costs.

**6. Waiver of Rights by Maker.**

Maker hereby waives (a) presentment, demand, protest, notice of dishonor and/or protest, and notice of non-payment; (b) the right, if any, to the benefit of, or to direct the application of, any security hypothesized to holder until all indebtedness of maker to holder, however arising, shall have been paid; and (c) the right to require holder to proceed against any party to this note, or to pursue any other remedy in holder power. Holder may proceed against maker directly and independently of any other party to this note, and the cessation of the liability of any other party or

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any reason other than full payment, or any revision, renewal, extension, forbearance, change of rate of interest, or acceptance, release, or substitution of security, or any impairment or suspension of holder's remedies or rights against any other party, shall not in any way affect the liability of maker.

DATED: 6/6/07

  
\_\_\_\_\_  
Barry Cohen

  
\_\_\_\_\_  
Chris Cohen

05/15/2007 11:55 From: 301471  
56221G2960Page: 4/14 Date: 6/5/2007 6:53:27M  
RICHARD P WAGNER

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**COPY****FIRST PREFERRED MORTGAGE****NATIONAL VESSEL DOCUMENTATION CENTER****RECEIVED/FILED**Official No: 515-295

20 APR '04 10:08 AM

On the vessel:  
POINT LOMA

RECORDED: APRIL 04:70 PAGE 497

Dated: 10/13/03

RECORDATION OFFICER

Amount of Mortgage \$215,000.000

and made by BARRY COHEN And CHRIS COHEN a married couple  
(Hereinafter called "Owner")**WITNESSETH**

Whereas, the maker, Mortgagor herein, is the sole owner of the whole of the vessel  
(if more than one vessel is mortgaged hereunder, the term vessel means each such vessel)  
hereinafter named and described, and is justly indebted to the Mortgagee, as evidenced by the  
promissory note dated 10/13/03 in the principal amount of \$215,000.00, payable to the order  
of Mortgagee as follows:

Per the Attached Promissory Note which shall become a part of this mortgage.  
**THE TOTAL AMOUNT OF THIS MORTGAGE IS TWO HUNDRED FIFTEEN THOUSAND  
DOLLARS AND PERFORMANCE OF MORTGAGE COVENANTS.**

And has agreed to give this Mortgage as security, and has authorized and directed the  
execution and delivery hereof.

**NOW, THEREFORE**, in consideration of the premises and for other good and  
valuable considerations, receipt of all of which is hereby acknowledged and to secure payment of  
said indebtedness and interest and other sums that hereafter may become due pursuant hereto and  
the performance of all covenants hereof. Owner by these presents mortgages and conveys unto  
Mortgagee, its successors and assigns, the whole of the Vessel named below and further  
described in her (their) last marine document(s) issued and identified as follows:

**EXHIBIT C**

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Name: POINT LOMA  
Home Port: Avila Beach, California  
Official Number: 575298

Together, with all masts, booms, cables, engines, machinery, bowsprits, sails, rigging, boats, anchors, chains, tackle, apparel, furniture, fittings, tools, pumps, equipment and supplies, and fishing and all other appurtenances and accessories and additions, improvements and replacements now or hereafter belonging thereto, whether or not removed there from, all of which shall be deemed to be included in the term "vessel" herein, and said document(s) being deemed included herein by reference;

TO HAVE AND TO HOLD all singular the above described vessel unto Mortgagee, its successors and assigns, forever;

PROVIDED, HOWEVER, that if Owner, his heirs, executors, administrators or its successors or assigns shall perform and observe all and singular the terms, covenants and agreements herein, then this Mortgage shall cease, otherwise to remain in full force and effect.

Nothing herein shall be deemed or construed to subject the lien hereof any property other than a vessel as the term issued in Title 46, Chapter 313, and Section 31322 of the United States Code. Owner agrees to pay said indebtedness with interest thereon as herein and in said note provided, and to perform and observe the further terms, covenants and agreements herein, and to hold the vessel subject thereto.

#### ARTICLE I. PARTICULAR COVENANTS OF OWNER

Owner Covenants as follows:

1. Owner is and shall continue to be a citizen of the United States entitled to own and operate said vessel under her marine document, which Owner shall maintain in full force and effect; and all action necessary for the execution, delivery and validity hereof and of the

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good faith affidavit filed herewith and of said note has been taken. If a corporation, Owner is duly organized and is and shall continue in good standing under the laws of the State of NOT APPLICABLE and authorized to do business and in good standing in any other State wherein Owner regularly does business.

2. Owner lawfully owns and possesses the vessel free from all liens and encumbrances whatsoever except as may herein below be specified and shall warrant and defend title to and possession of all and every part thereof for the benefit of Mortgagor against all persons whomsoever. Owner shall not set up against Mortgagor of this mortgage any claim of Owner against Mortgagor and/or assignee under any past or future transaction.
3. Owner shall at his (its) own expense, keep the vessel fully and adequately insured under usual full marine insurance with policy valuation not exceeding the amount insured and, in the aggregate as to all vessels mortgaged herein, in at least the amount of the unpaid principal balance of this Mortgage, and shall maintain insurance to cover protection and indemnity risks, tapers liability risks if the vessel performs towage, employees compensation and other risks and liabilities from time to time specified by Mortgagor. All insurance shall be taken out in the name of Owner and shall by its terms be payable to Mortgage for account of Mortgage and Owner as their respective interests may appear, and all policy forms, underwriters and amounts shall be subject to Mortgagor's approval. Owner shall notify, and shall request underwriters to agree reasonably in advance to notify Mortgagor of any cancellation of or material change in any insurance coverage. All policies, binders and cover notes shall be delivered to Mortgagor with evidence satisfactory to it that all premiums and other charges therefore have been fully paid. Owner shall maintain all such insurance unimpaired by any act, breach or warranty or otherwise.
4. Owner shall comply with and not permit the vessel to be operated contrary to any provision of the law, treaties, conventions, rules, regulations or orders of the United States, any State and/or any other jurisdiction wherein operated, and/or of any department or agency thereof.

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RICHARD P WAGNER

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nor remove the vessel from the limits of the United States save on voyages with the intent of returning, nor abandon the vessel in any foreign port. Owner shall do everything necessary to, establish and maintain this Mortgage as First Preferred Mortgage on said vessel.

5. Neither the Owner, Agent nor Master of the vessel has or shall have any right, power or authority to create, incur or permit to be placed or imposed on the vessel or any part thereof any lien whatsoever other than to the Mortgagor or for crew's wages or salvage.

6. Owner shall place and keep prominently in the pilot house (if any), chart room or Master's cabin or elsewhere on the vessel as specified by Mortgagor any notice of this Mortgage required by Mortgagor, and shall keep proper copy hereof with the ship's papers and exhibit the same to all persons having business with the vessel, and to Mortgagor on demand.

7. Owner shall pay when due all taxes, assessments, government charges, fines and penalties lawfully imposed and promptly discharge any and all liens whatsoever upon vessel. Owner shall at his (its) own expense at all times maintain the vessel in thorough repair and working order and shall make all proper renewals and replacements.

8. If the vessel shall be libeled, attached, detained, seized or levied upon or taken into custody under process or under color of any authority, Owner shall forthwith notify Mortgagor by telegram, confirmed by letter, and forthwith discharge or release the vessel therefrom and in any event within fifteen (15) days after such attachment, detention, seizure, levy or taking into custody.

9. Owner shall at all times afford Mortgagor complete opportunity to inspect the vessel and cargoes and papers thereof, and to examine Owner's related accounts and records; and shall certify quarterly and, if Mortgagor requests, monthly, that all wages and all other claims whatsoever which might have given rise to a lien upon the vessel have been paid.

10. Owner shall not, without prior written consent of Mortgagor, sell or mortgage the vessel or any interest therein nor charter her except to persons and for uses lawful for American vessels and then only provided said insurance be unaffected thereby or adequately replaced; nor,

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if a corporation, to merge or consolidate with any other person, firm or corporation, or dissolve.

11. From time to time Owner shall execute and deliver such other and further instruments and assurance as in the opinion of Mortgagee's counsel may be required to subject to vessel more effectual to the lien hereof and to the payment of said indebtedness and for operation of the vessel as herein provided, and to effectuate sales as provided in paragraph (C) of Section 1 of Article 11.

#### ARTICLE II - DEFAULT

1. In any one or more of the following events, herein termed events of default:

(a) Default in the punctual payment of the principal of the note secured hereby or any installment thereof, or in the due and punctual performance of any provision of Sections 3, 4, 5, 6, 8 and 10 or Article I hereof, or attempt to violate Sections 4 or 10 of Article I hereof, or default continuing for fifteen (15) days in performance of any other covenant herein; or

(b) Commission of any act of bankruptcy by Owner or approval by any court of a petition or answer asking for reorganization, arrangement, extension or other relief under any bankruptcy law; or to appointment of a receiver for Owner or any of Owner's property or the taking by any court of any action comparable thereto; or rendition of a final judgment against Owner for the payment of money and failure of Owner to discharge the same within ninety (90) days or stay the execution thereof pending appeal; or Mortgagee's conclusion in good faith at any time that, through actual or prospective impairment of Owner's net current asset position, net worth, asset-liability ratio, or earning, or through prospective violation of any provision of this Mortgage, Mortgagee is in danger of losing said debt, or any part thereof, by delaying collecting thereof until the time above limited for the payment thereof, then, and in every such case, Mortgagee may:

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- (a) Declare the principal of said note and all accrued interest thereon to be and they shall then become and be due and payable forthwith, after which they shall bear interest at the rate of 10% per annum;
- (b) Recover judgment for, and collect out of any property of Owner, any amount thereby or otherwise due hereunder; and/or collect all earned charter hire and freight monies relating to services performed by the vessel, Owner hereby assigning to Mortgagee such earned charter hire and freight monies then owing; and/or
- (c) Retake the vessel without legal process at any time wherever the same may be, and, without being responsible for loss or damage, hold and in Mortgagee's or in Owner's name lease, charter, operate or otherwise use the vessel for such time and on such terms as Mortgagee may deem advisable, being accountable for net profits, if any, and with the right to dock the vessel free of charge at the Owner's premises or elsewhere at Owner's expense; and/or sell the vessel, free from any claim by Owner of any nature whatsoever, in the manner provided by the law; to the extent permitted by law, such sale may be public or private, without notice, without having the vessel present, and/or Mortgagee may become the purchaser.

For such purpose Mortgagee and its agents are hereby irrevocably appointed the true and lawful attorneys of Owner in his (its) name and stead to make all necessary transfers of the vessel thus sold.

2. In the event that the vessel shall be arrested or detained by any officer of any court or by any other authority, Owner hereby authorizes Mortgagee, its officers, representatives and appointees, in the name of the Owner or of Mortgagee, to receive or to take possession thereof, and to defend any action and/or discharge any lien.

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3. Each and every power or remedy herein given to Mortgagee shall be cumulative, and in addition to all powers or remedies now or hereafter existing in admiralty, in equity, at law or by statute, and may be exercised as often as may be deemed expedient by Mortgagee. No delay or omission by Mortgagee shall impair any right, power, or remedy, and no waiver of any default shall waive any other default. In any suit Mortgagee shall be entitled to obtain appointment of a receiver of the vessel and the earnings thereof, who shall have full rights and powers to use and operate the vessel, and to obtain a decree ordering and directing the sale and disposition thereof.
4. The net proceeds of any judicial or other sale, and any charter, management, operation or other use of the vessel by Mortgagee, of any claim for damages, of any judgment, and any insurance received by Mortgagee (except to the extent paid to Owner or applied in payment of repairs or otherwise for Owner's benefit) shall be applied as follows:

**FIRST:** To the payment of all attorneys fees, court costs, and any other expenses, losses, charges, damages incurred or advances made by Mortgagee in the protection of its rights or caused by Owner's default hereunder or under the note secured hereby, with interest on all such amounts at the rate of 10% per annum; and to provide adequate indemnity against any liens for which priority over this Mortgage is claimed;

**SECOND:** To the payment of all interest, to date of payment, on the note and any or all other sums secured hereby, and as to any balance of such proceeds, to the payment of next of any or all matured installments of principal and then of any or all un-matured installments of principal in the inverse order of this maturity.

Mortgagee shall be entitled to collect any deficiency from Owner. Owner shall be entitled to any surplus, subject to set-off in favor of Mortgagee for any other indebtedness of Owner.

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RICHARD P. WAGNER

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5. All advances and expenditures which Mortgagor in its discretion may make any repairs, insurance, payment of liens or other claims, defense of suit, or for any other purpose whatsoever related hereto or said note and all damages sustained by Mortgagor because of defaults, shall be repaid by Owner on demand with interest at 10% per annum, and until so paid shall be a debt due from Owner to Mortgagor secured by the lien thereof. Mortgagor shall not be obligated to make any such advances or expenditures, nor shall the making thereof relieve Owner of any obligation or default with respect thereto.

#### ARTICLE III - POSSESSION UNTIL DEFAULT

Until one or more of the events of default hereinbefore described, Owner shall be permitted to obtain actual possession and use of the vessel.

#### ARTICLE IV - SUNDRY PROVISIONS

All covenants and agreements of Owner herein contained shall bind Owner, his heirs, executors, administrators and assigns, or its successors and assigns, shall inure to the benefit of Mortgagor and its successors and assigns. Following any assignments hereof, any reference herein of "Mortgagor" shall be deemed to refer to the assignee. If one or more persons is the Owner herein, "his" shall mean "their".

**FUTURE ADVANCES.** This mortgage is executed for the purpose of securing not only the payment of the above described note but also to secure all future advances made by the holder of said note to the mortgagor; and said mortgage shall remain in full force and effect to secure all future advances and all renewals or extensions of the above described note.

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IN WITNESS WHEREOF, on the day and year above written, Owner has executed this Mortgage, or if a corporation, has caused this Mortgage to be executed in its name and its corporate seal to be affixed hereto by its proper officers thereunto duly authorized or as required by State law.

*Barry S. Cohen*  
*Chris S. Cohen*

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## CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

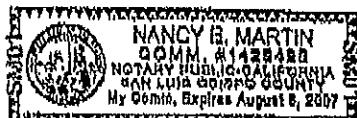
State of California

County of San Luis Obispo

On 10-31-03 before me, Nancy E. Martin, Notary Public, personally appeared Christene Layne Cohen and Barry A. Cohen,

personally known to me - OR -  proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.



Signature of Notary

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

## CAPACITY CLAIMED BY SIGNER (PRINCIPAL)

Individual  
 Corporate Officer

## DESCRIPTION OF ATTACHED DOCUMENT

First Preferred Mortgage

## Title

 Partner(s)

Limited  
 General

11 plus attached acknowledgment

## Number of Pages

10-31-03

## Date of Document

None

Absent Signer (Principal) is Representing:

Signer(s) Other Than Name(s) Above



1 industry in California, including in the processing sector and in owning and operating fishing  
2 vessels. I have been engaged in the fisheries business in California for over 40 years.

3       3. For at least 10 years, I have done business with the Plaintiff in this case, Del Mar  
4 Seafoods, Inc. ("Del Mar"). In fact, from 2004 until 2006, I was employed by Del Mar in its  
5 processing plant at Watsonville, California and was paid \$2,000 a week. The company also  
6 asked me to help deal with issues at its processing plant in Astoria, Oregon in 2006, which I did.  
7 Upon my return from Oregon, I was let go in October 2006 because I was told by Joe Cappuccio  
8 that the company no longer wished to be in the groundfish business. I had been told by Joe  
9 Roggio, prior to moving from Cambria, California to Aptos, California in 2004, that I could have  
10 a job with Del Mar as long as I wanted if I moved up there to work for them.

11       4. In February 1999, Del Mar and I formed a joint venture, the purpose of which was  
12 to buy, process, and sell fish from a site I leased at the Port San Luis Pier in Avila Beach,  
13 California. Del Mar agreed to fund the joint venture and I supplied a processing crew, access to  
14 fishing vessel production, and sales relationships. In 2001, or thereabouts, Del Mar and I began  
15 planning for a new joint venture in Mexico, using the F/V POINT LOMA. In this context, I was  
16 dealing with Joe Cappuccio, the President of Del Mar. Del Mar had advanced funds to me to  
17 upgrade the F/V POINT LOMA as part of an anticipated 50/50 partnership in the Vessel. The  
18 agreement for this 50/50 partnership was oral. Later that year, because Del Mar did not want to  
19 continue the 50/50 partnership, but had provided funds to upgrade the vessel, we agreed to turn  
20 Del Mar's contributed funds into a loan.

21       5. About two years later, in 2003, Del Mar requested that we provide security for this  
22 prior loan. We then entered into a Promissory Note with Del Mar to make arrangements to repay  
23 the company over an extended period of time. We also entered into a Ship Mortgage with Del  
24 Mar as security for repayment of the loan amount of \$215,000. In the transaction, we were not  
25 represented by counsel. Del Mar's attorneys drafted the Promissory Note and Ship Mortgage.  
26 The entire purpose of the financing arrangement was to provide security for repayment of the  
27 funds used to upgrade the vessel, and no other.

DAVIS WRIGHT TREMAINE LLP

6. Chris Cohen and I are still married and I am acting in this case as agent for the interests of the marital community. My wife currently resides in Arizona.

7. In 2004, we transferred, the ownership of the F/V POINT LOMA to a Subchapter S corporation, the F/V Point Loma Fishing Company, Inc., of which I am the President and manager and in which my wife and I own the stock 50/50. The F/V POINT LOMA remains subject to Del Mar's Ship Mortgage. Attached as Exhibit A to this declaration is a true copy of the vessel's current documentation certificate issued by the U.S. Coast Guard. I am acting in this case as the agent for the owner of the vessel, the F/V Point Loma Fishing Company, Inc.

8. The F/V POINT LOMA engages in the groundfish fisheries located outside the State of California and in the U.S. Exclusive Economic Zone ("EEZ") (from three to 200 nautical miles) and is licensed to land its catch only in the State of California. The vessel's home port is Port San Luis, California. I have never used the vessel to fish anywhere except in the EEZ off California. At no time have I ever threatened to move the vessel to another state or another part of California, nor could I do so very easily without obtaining new licenses and new markets.

9. A special limited entry permit is required to engage in the Pacific Groundfish Fisheries off California regulated by the National Oceanic and Atmospheric Administration (“NOAA”) in the U.S. EEZ. However, unlike most other such permits, the NOAA permit is issued not to the vessel but to a person qualifying as the owner of the permit. The NOAA permit has been issued to, and is owned by, the F/V Point Loma Fishing Company, Inc. Attached as Exhibit B is a copy of the NOAA permit held by the company. The permit may be used on the F/V POINT LOMA or it may be transferred to another vessel of similar length.

10. The Promissory Note and Ship Mortgage do not cover the NOAA permit for at least two reasons. First, neither the Promissory Note nor the Ship Mortgage contains language that includes the NOAA permit as security. Second, and more importantly, NOAA does not recognize the existence of liens against such permits. Attached as Exhibit C is a copy of a letter from NOAA confirming this position. Thus, I have never agreed to provide Del Mar a security interest in this NOAA permit.

1       11. In December of 2004, while I was working for Del Mar, I made a \$5,000 payment  
2 on the Promissory Note. Attached as Exhibit D is the check representing this payment. At the  
3 end of 2005, Joe Cappuccio and Joe Roggio, in a meeting, told me that Del Mar's bank, which  
4 provided a credit line to the company, had expressed concern about the size of the loan for the  
5 F/V POINT LOMA. Joe Cappuccio asked me to make a large advance payment on the loan.  
6 Later, Joe Roggio told me at another meeting that, if I made the advance payment, he would see  
7 to it that the vessel loan with Del Mar would be interest free. Because of this promise and  
8 understanding, we took out a home equity loan on our house and paid Del Mar \$175,000, with the  
9 expectation that no interest would be due on the Promissory Note and that the payment comprised  
10 advance monthly payments into the future. The payment date was November 10, 2005. Attached  
11 as Exhibit E is the check for this advance payment on the Promissory Note. It was my  
12 understanding that this payment (and the earlier one) reduced the total amount of the debt from  
13 \$215,000 to \$35,000; that monthly payments were covered well into the future; and that no  
14 interest would be due on payment of the remaining amount. When I delivered the check to Joe  
15 Cappuccio, I told him I would pay the rest as soon as I can. In response, he said it was now such  
16 a small amount that he was not concerned about it any more, which reinforced by understanding  
17 that I had made advance payments on the Note.

18       12. Within a month or so after this advance payment, I recall receiving a piece of paper  
19 which purported to be a Schedule of Payments from Joe Roggio. Attached as Exhibit F is the  
20 copy of the document I received from Joe Roggio. The Schedule contains references to various  
21 debts not related to the Promissory Note. I looked it over and told him this does not look right to  
22 me. He said he was just "cleaning up the books." I didn't want to tell him how to keep his books  
23 but I did not tell him that the \$175,000 payment could be applied to anything other than the  
24 Promissory Note, nor did I agree with any of the amounts listed in his Schedule of Payments. For  
25 certain, he did not expressly ask if I was agreeable to applying the \$175,000 to these other debts  
26 or to treating the other debts as "advances" under the Promissory Note, which would then be  
27 secured by the Ship Mortgage.

1       13. After I was let go by the company in October 2006, I asked Joe Roggio to let me  
2 know where I stood with the company. He then gave me a newer revised version of the Schedule  
3 of Payments, probably in December 2006. That new Schedule showed new debts called "Olde  
4 Port Balance, Point Loma Balance, and Fees for Olde Port Case." I, again, never agreed that  
5 these amounts would be treated as "advances" under the Promissory Note, to be secured by the  
6 Ship Mortgage, nor did I ever agree that they were correct in any way.

7       14. I made additional payments on the Promissory Note in January (\$2,000), February  
8 (\$3,000) and March (\$3,000), 2007. Attached as Exhibit G are the checks that represent those  
9 payments. I did so after being asked by Joe Roggio to make payments on what I owed, but did  
10 not specify any amount or for what.

11       15. The seizure of the F/V POINT LOMA on June 7, 2007 came as a complete shock  
12 to me. I never received any prior notice, orally or written, from Del Mar that I had to make any  
13 monthly payments or owed any interest after the advance payment was made in November 2005  
14 or the vessel would be seized. It has always been my understanding that the advance payments  
15 made me current on the Note through February 2009.

16        16. The seizure of the vessel has completely disrupted its operations. At present, I am  
17        losing at least \$20,000 a month in gross sales for the vessel. I have been trying to keep the  
18        captain, Dave Kobak, and the two crew members available so that I can take the vessel fishing as  
19        soon as possible, paying about \$2,000 a week to date. The vessel is my only source of income at  
20        present, other than my Social Security payments.

17. I believe that the seizure of the Vessel is unfair and unnecessary and not consistent  
at all with my agreements with Del Mar.

23 I declare under penalty of perjury under the laws of the State of California that the  
24 foregoing is true and correct.

25 DATED this 9th day of July, 2007.

/s/ Barry A. Cohen  
Barry A. Cohen

## Exhibit A

DHS, USCG, CG-1270 (REV. 06-03)

OMB APPROVED

2115-0110

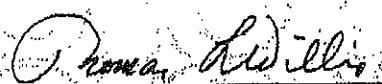


# UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD

NATIONAL VESSEL DOCUMENTATION CENTER

## CERTIFICATE OF DOCUMENTATION

VESSEL NAME POINT LOMA		OFFICIAL NUMBER 515298	IMO OR OTHER NUMBER 7049354		YEAR COMPLETED 1968
HAILING PORT PORT SAN LUIS, CA		HULL MATERIAL STEEL		MECHANICAL PROPULSION YES	
GROSS TONNAGE 126 GRT	NET TONNAGE 86 NRT	LENGTH 70.8	BREADTH 21.5	DEPTH 11.7	
PLACE BUILT SIRACUSAVILLE, LA					
OWNERS F/V POINT LOMA FISHING COMPANY INC		OPERATIONAL ENDORSEMENTS FISHERY			
MANAGING OWNER F/V POINT LOMA FISHING COMPANY INC 7121 FERN FLAT ROAD APTOS, CA 95003					
RESTRICTIONS NONE					
ENTITLEMENTS NONE					
REMARKS NONE					
ISSUE DATE DECEMBER 15, 2006		  THIS CERTIFICATE EXPIRES JANUARY 31, 2008			
VDS 448004		DIRECTOR, NATIONAL VESSEL DOCUMENTATION CENTER			

PREVIOUS EDITION OBSOLETE. THIS CERTIFICATE MAY NOT BE ALTERED.

## Exhibit B

NOAA #88-156a (Sept. 2003)

	<b>U.S. DEPARTMENT OF COMMERCE</b> National Oceanic and Atmospheric Administration National Marine Fisheries Service 7600 Sand Point Way NE, Building #1 Seattle, WA 98116-0070 Telephone: (206) 526-4353	
---	--	---

<b>2007 FEDERAL PACIFIC COAST GROUNDFISH PERMIT</b>	
Issued Pursuant to: 50 CFR Part 320 Subpart G 16 U.S.C. 1801	

Vessel No.	515298	Name	POINT LOMA	Actual Length	70.66 feet
------------	--------	------	------------	---------------	------------

Permit No.	Valid From/Through	Permit Holder and Address
GF0023	01-Jan-07 31-Dec-07	<b>PERMIT HOLDER (vessel owner)</b> <b>F/V POINT LOMA FISHING COMPANY, INC</b> 7121 FERN FLAT ROAD APTOS, CA 95003
<b>PERMIT OWNER</b>	<b>ENDORSEMENTS:</b> TRAWL GEAR ENDORSED LENGTH: 70.80 FEET	<b>F/V POINT LOMA FISHING COMPANY, INC</b> 7121 FERN FLAT ROAD APTOS, CA 95003
	<b>F/V POINT LOMA FISHING COMPANY, INC</b> 7121 FERN FLAT ROAD APTOS, CA 95003	

**P E R M I T C O N D I T I O N S A N D I N F O R M A T I O N**

Groundfish permits and associated endorsements confer a privilege to participate in the groundfish fishery off the coasts of Washington, Oregon and California with limited entry gear, in accordance with the limited entry system established under the Groundfish Fishery Management Plan (FMP) as amended. Future amendments to the FMP or implementing regulations may modify privileges associated with this permit, or may abolish the limited entry system.

1. This permit is for the vessel as named and described above and such vessel owner(s) as named. This permit must be kept on such vessel at all times.
2. This permit authorizes fishing operations to be conducted by the vessel registered as noted above.
3. This permit is effective on the date indicated above. It continues in effect until the expiration date printed above. Any change in ownership information (including address, vessel name, or vessel length) must be reported to the Regional Administrator. Application permit must be made if the permit expires or if ownership changes.
4. This permit may be canceled (including suspension or revocation) if the vessel is not operated in accordance with the laws and for a new regulations pertaining to fisheries for which the vessel is permitted.
5. Loss or theft of this permit should be reported to the Special Agent in Charge, NMFS Law Enforcement (206-526-6133) or the Fisheries Permit Office (206-526-4353).
6. This permit may not be registered for use with a different vessel more than once every calendar year except in the case of death of permit holder, or if the permitted vessel is totally lost.
7. Annual renewal of the permit is required by November 30 of each year.

[Euagkbgbkdlfb]

## Exhibit C



UNITED STATES DEPARTMENT OF COMMERCE  
 National Oceanic and Atmospheric Administration  
 NATIONAL MARINE FISHERIES SERVICE  
 Sustainable Fisheries Division F/NWR2  
 7800 Sand Point Way N.E., Bldg. 1  
 Seattle, WA 98116-0070

July 3, 2007

Mr. Barry Cohen  
 P.O. Box 40  
 Avila Beach, CA 93424

Dear Mr. Cohen

As we discussed today, the National Marine Fisheries Service (NMFS), Northwest Region does not accept requests to place liens on Pacific Coast Groundfish Limited Entry Permits ("A" endorsed). As I noted, the Sustainable Fisheries Act (Public Law 104-297) contained a provision that directed NMFS to implement a central lien registry system for all NMFS fishing permits. However, NMFS has not implemented a central lien registry system. The Northwest Region policy has been not to implement a regional lien registry system and feels it best that such a system should be national in scope.

We have advised other permit owners that a financial entity may become an owner or co-owner of a trawl permit to insure their interests.

If you have any further questions regarding this matter, please call me at 206-526-4353.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Ford".

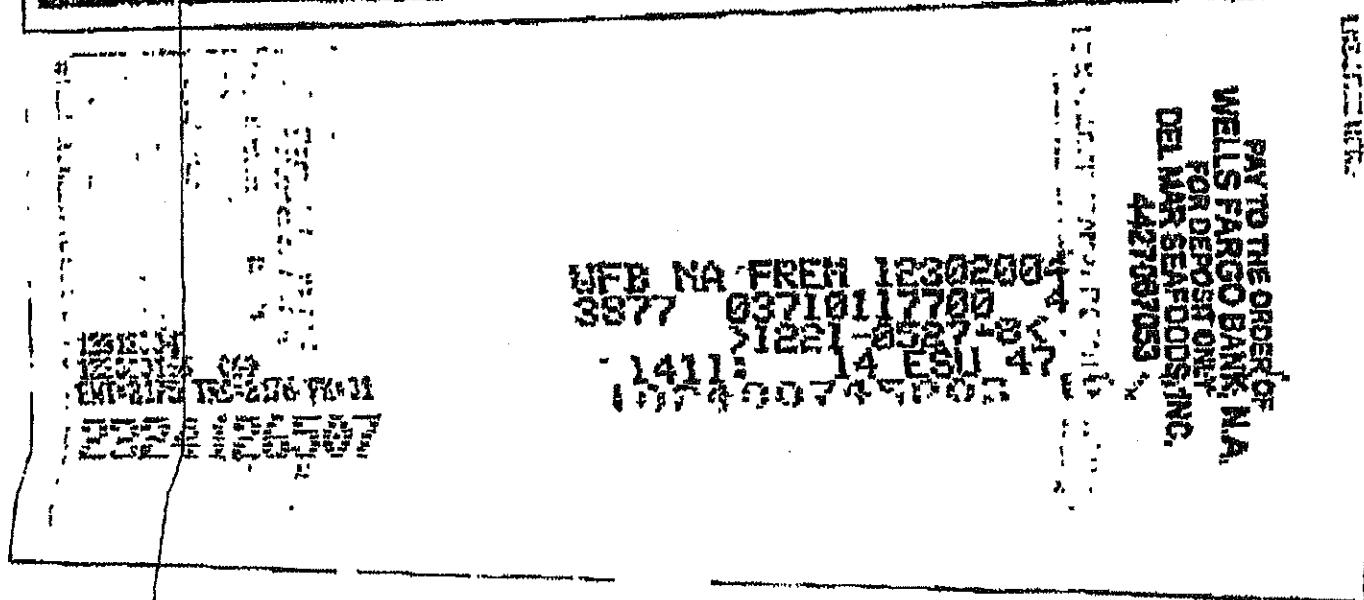
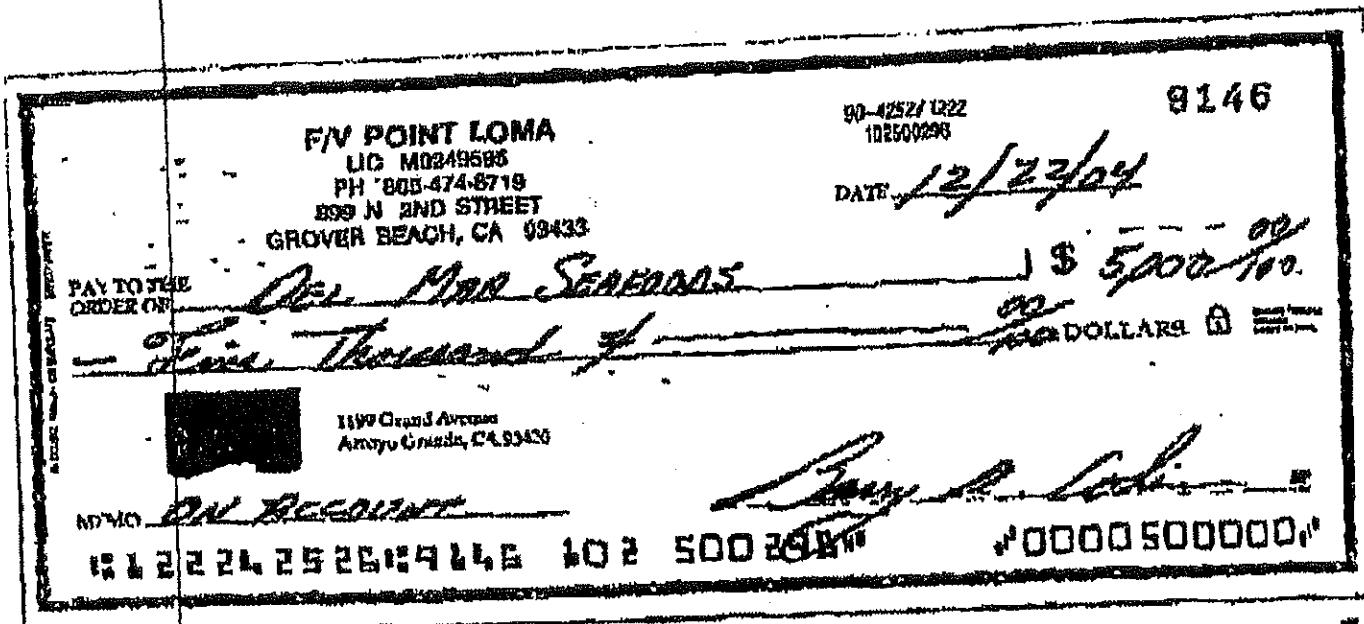
Kevin Ford  
 Fisheries Permit Office



## Exhibit D

50/11 47-3007 NATIONAL BANK;

Account: 102500290  
 Check: 9146  
 Amount: 5000.00  
 Date Cleared: 12/31/04

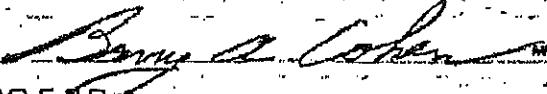


## Exhibit E

Wells Community & Coast National Bank

Account Number	102000579	Tracer Number	R:1 B:7 S:15
Amount	175,000.00		
Posting Date	11/14/2005		
Check Number	7689		
TranCode	7689		
Routing Number			

View Query Results  View Front  View Back  View Front AND Back

BARRY A. COHEN LIC. MO249895 CHRIS L. COHEN LIC. B6943892 PH. 831-661-0867 7121 FERN FLAT RD. APTOS, CA 95003		90-4252/1222 102000579	7689
PAY TO THE ORDER OF <u>DEL MAR SEAFARERS</u>		\$175,000 00	DOLLARS <input type="checkbox"/>
<u>One Hundred &amp; Seventy-Five Thousand \$175,000.00</u>		*	
 1119 Grand Avenue Aptos, CA 95003 831-471-4546			
MEMO 412224252617689 102 000579		000175000000	
ENDORSE HERE			
WED MA FREN 11182605 3278 04310491808 >1221-0527-8 16431 14 ESU 44 CREDITED TO THE ACCOUNT OF WITHIN NAMED PAYEE LACK OF ENDORSEMENT BANK. N.A. D.O. WELLS FARGO BANK. N.A. AU 00592 AU 00592			
11182605 2624990239 DFT-1053 TRC-1452 PK-04			

## Exhibit F

T-131 P.002/000

P-281

11-15-2005 08:56AM FROM DEL MAR SEAFOODS INC ON

Del Mar Seafoods, Inc.  
Schedule of Payments

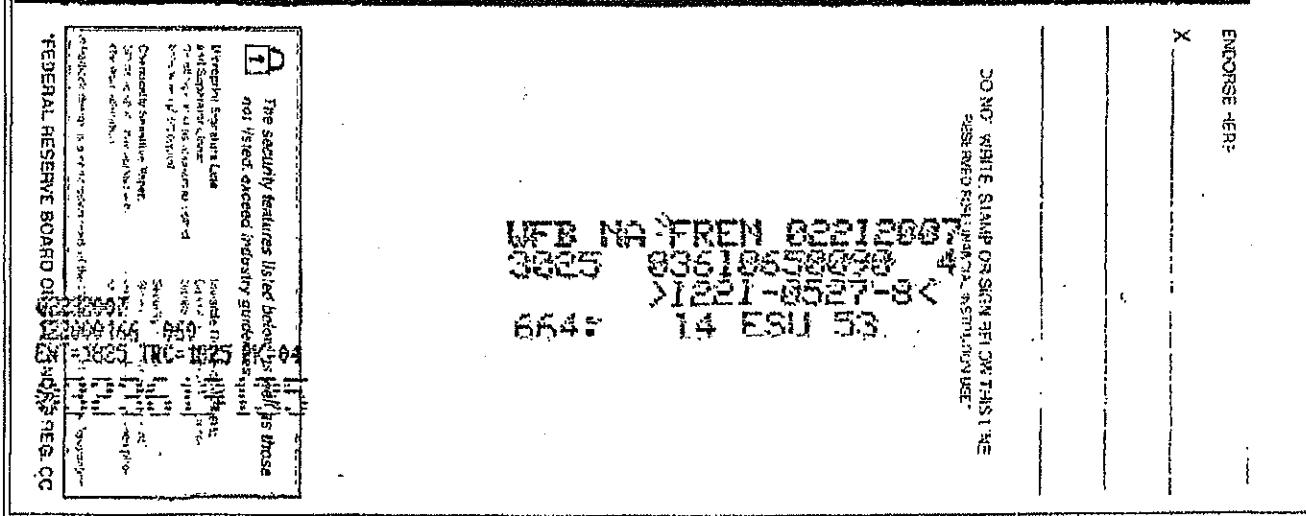
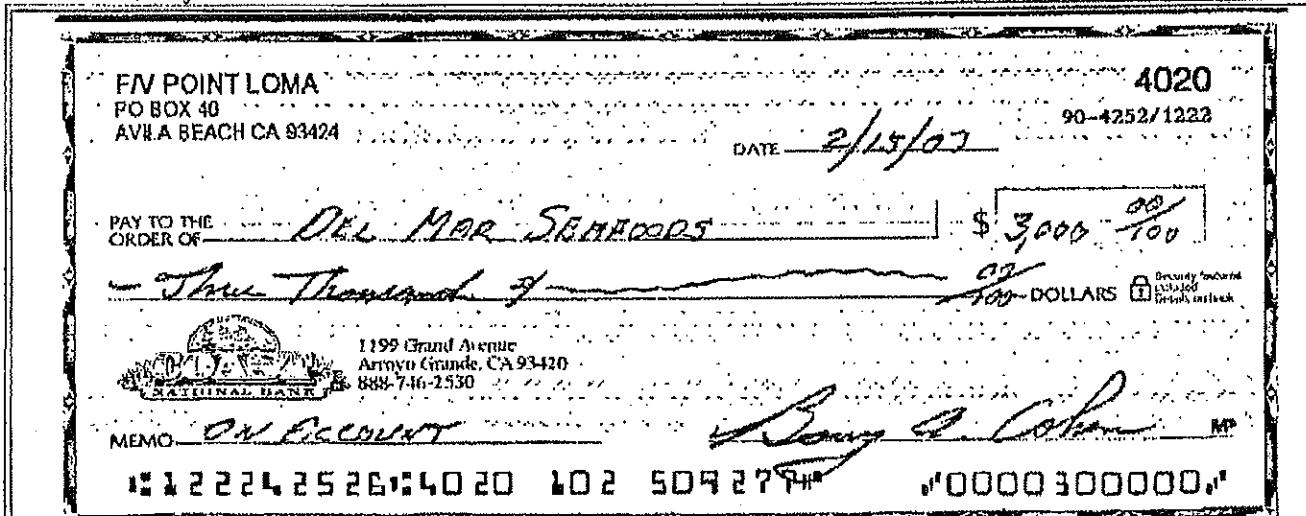
	Debit Column	Credit Column	Inventory	Previous	Entry	Total
Beginning Balance	15,830.41	10,000.00	10,830.41	10/21/01	10/27/05 48	205,023.50
12/22/2003 Daily Profit		40				0/100.00
02/12/2003 Amended Payment			0/1,494.00			1,494.00
03/20/2003 Amended Payment			0/1,000.00			1,000.00
11/10/2003 (in A)			0/200.00			0/200.00
11/10/2003 Payment from Party	(15,830.41)	(15,000.00)	10,830.41	(6,023.50)	(10/27/05 70)	(176,023.00)
Ending Balance						11,000.00

## Exhibit G

Web Client-Minneapolis Coast National Bank

Find	Account Number	102509277	Tracer Number	R:1 B:6 S:1370
Clear	Amount	3,000.00		
Print	Posting Date	02/23/2007		
Log Off	Check Number	4020		
	TranCode	4020		
	Routing Number			

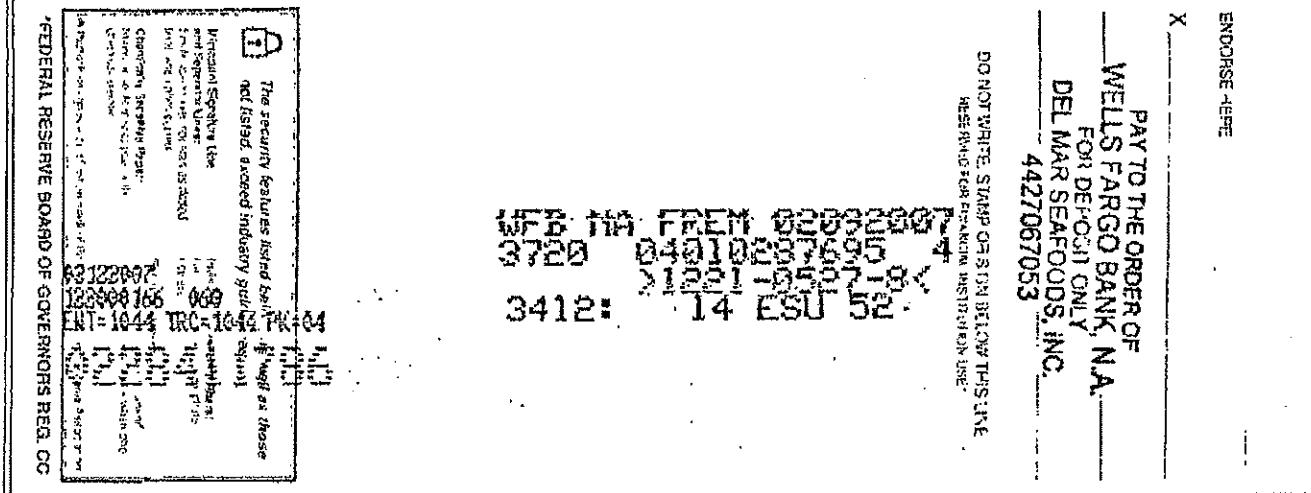
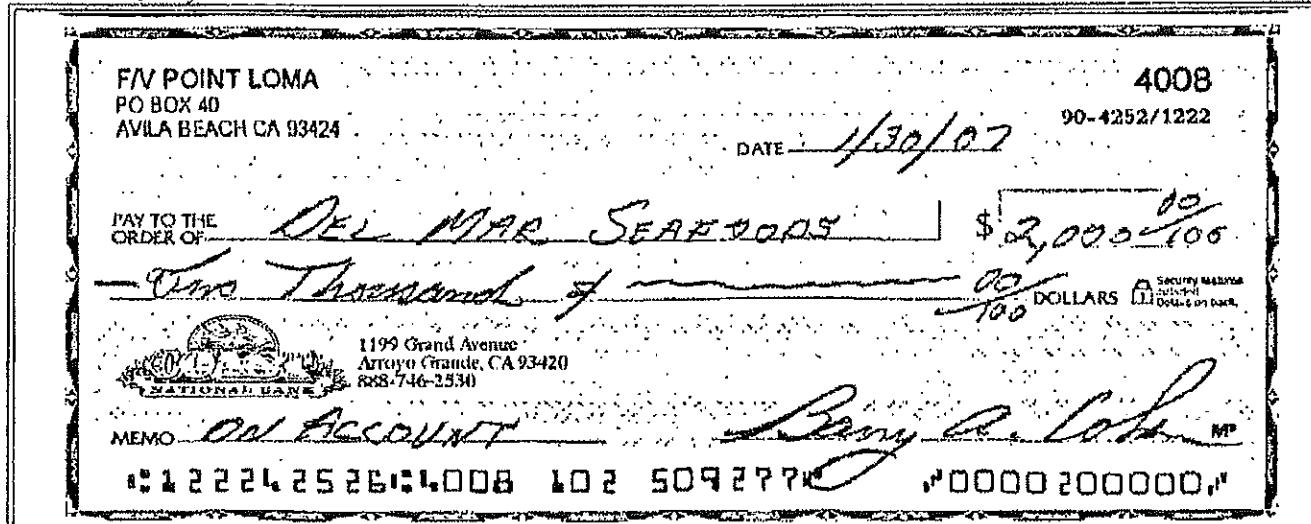
View Query Results  View Front  View Back  View Front AND Back



View Front View Back View Front AND Back

<input type="button" value="Find"/>	<input type="button" value="Clear"/>	<input type="button" value="Print"/>	<input type="button" value="Log Off"/>
Account Number		102509277	
Amount		2,000.00	
Posting Date		02/12/2007	
Check Number		4008	
TranCode		4008	
Routing Number			

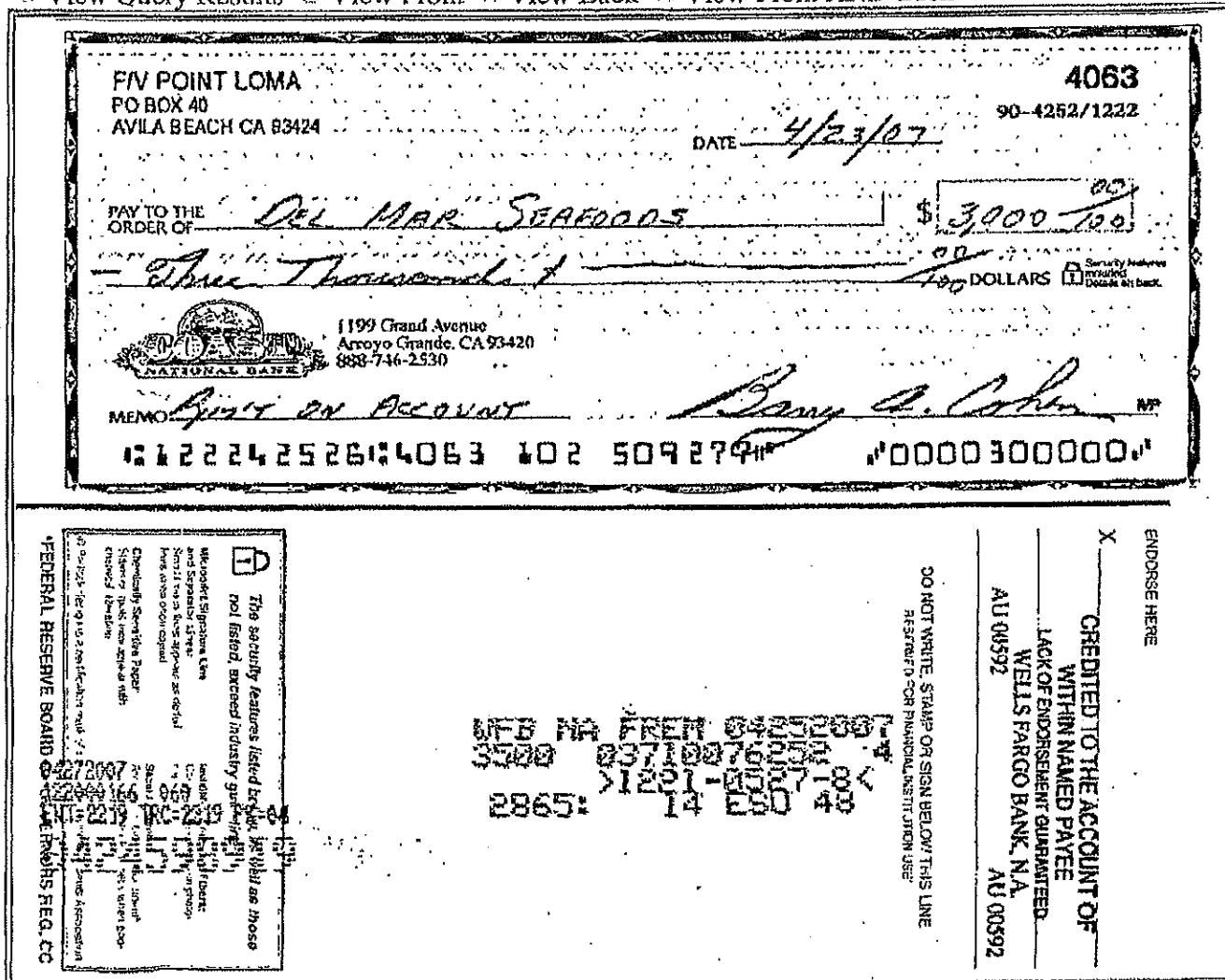
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Web Client-NetImage Coast National Bank

<a href="#">Find</a>	Account Number	102509277	Tracer Number	R:1 B:5 S:1290
<a href="#">Clear</a>	Amount	3,000.00		
<a href="#">Print</a>	Posting Date	04/27/2007		
<a href="#">Log Off</a>	Check Number	4063		
	TranCode	4063		
	Routing Number			

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Section	
.....	1473
.....	1485
.....	1511
.....	1521
.....	1530
.....	1541

the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance has such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary. (Enacted 1872.)

#### Research References

California Jury Instructions-Civil, 8th Edition 10.83, Discharge by Performance.

#### § 1478. Payment defined

PAYMENT, WHAT. Performance of an obligation for the delivery of money only, is called payment. (Enacted 1872.)

#### § 1479. Act of performance applicable to two or more obligations; application to specific obligation

Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

One—If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

Two—If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of [the] debtor.

Three—If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

1. Of interest due at the time of the performance.
2. Of principal due at that time.
3. Of the obligation earliest in date of maturity.
4. Of an obligation not secured by a lien or collateral undertaking.
5. Of an obligation secured by a lien or collateral undertaking. (Enacted 1872. Amended by Code 1873-74, c. 612, p. 239, § 182.)

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#### § 1485. Ex

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#### § 1489.

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**EXHIBIT E**

Gregory W Poulos

08/20/2007 11:38 AM

To: "Fanger, Gwen" <GwenFanger@dwt.com>  
Subject: RE: Release of the Point Loma

Dear Ms. Fanger:

I have your below message, and I have also seen another email that you sent to my associate Max Kelley this morning regarding having the vessel's Captain present for a survey today. Please continue to coordinate the scheduling of the survey with Mr. Kelley.

As regards release of the vessel, we believe that the Court's order is clearly in error, and we intend to seek all available remedies including a motion to stay the release of the vessel pending re-hearing and / or to file an appeal with the Ninth Circuit Court of Appeals. As you know, filing a notice of appeal would result in an automatic stay of the order. In order to avoid this, and the incurring of additional costs for both parties, we are willing to discuss with you the posting of adequate security for the release of the vessel. During the hearing Mr. Walsh mentioned a letter of undertaking which we can most likely accept as security provided, of course, that it is issued by the vessel's insurer or P&I carrier or other adequate surety. The amount will of course need to be agreed and is typically about 1.5 times the amount of the claim.

We also note that the Court's order specifically requires your client to maintain insurance on the vessel, as does the mortgage. We have asked for proof of insurance but as of this morning it has not been forthcoming. Can you please fax or email to me immediately the proof of insurance which, again per the mortgage, must name our client as the loss payee. Since under the Mortgage the insurance is "subject to Mortgagee's approval" we need to immediately see the insurance. We also require that you provide "evidence...that all premiums and other charges therefore have been fully paid."

We look forward to your response by return.

Thank you.

Gregory W. Poulos  
Partner  
Cox, Wootton, Griffin, Hansen & Poulos, LLP  
190 The Embarcadero  
San Francisco, CA 94105  
Voice: (415) 438-4600 x201  
Fax: (415) 438-4601  
E-mail: mailto:goulos@cwghp.com  
Website: <http://www.cwghp.com>

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\*\*\*\*\*

"Fanger, Gwen" <GwenFanger@dwt.com>



"Fanger, Gwen"

To: <mkelley@cwghp.com>, "Walsh, James" <budwalsh@dwt.com>

**EXHIBIT F**



"Walsh, James" To: <gpoulos@cwghp.com>, "Fanger, Gwen" <GwenFanger@dwt.com>

<budwalsh@dwt.com> Subject: RE: Release of the Point Loma

08/20/2007 12:01 PM

Mr. Poulos:

Once again, you are overreaching in this case. First, our client will send a fax copy of the insurance policy in the near future. Second, the court order is not in error. Third, we will not provide additional security, and the court did not order any after we discussed the issue. Fourth, an appeal is a waste of time, as you well know. Finally, you and your client, or your surveyor, may not visit our client's vessel without permission after it is released to our client by the U.S. Marshall.

Your failure to disclose material facts to the judge, which he noted on the record, is grounds for wrongful arrest. You may want to advise your client to cut their losses.

James Walsh | Davis Wright Tremaine LLP  
505 Montgomery Street, Suite 800 | San Francisco, CA 94111  
Tel: (415) 276-6556 | Fax: (415) 276-6599  
Email: budwalsh@dwt.com | Website: www.dwt.com  
Bio: www.dwt.com/lawdir/attorneys/WalshJames.cfm

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco  
| Seattle | Shanghai | Washington, D.C.

-----Original Message-----

From: gpoulos@cwghp.com [mailto:gpoulos@cwghp.com]  
Sent: Monday, August 20, 2007 11:39 AM  
To: Fanger, Gwen  
Cc: Walsh, James; Mark Holmes; mkelley@cwghp.com; amuzingo@cwghp.com  
Subject: RE: Release of the Point Loma

Dear Ms. Fanger:

I have your below message, and I have also seen another email that you sent to my associate Max Kelley this morning regarding having the vessel's Captain present for a survey today. Please continue to coordinate the scheduling of the survey with Mr. Kelley.

As regards release of the vessel, we believe that the Court's order is clearly in error, and we intend to seek all available remedies including a motion to stay the release of the vessel pending re-hearing and / or to file an appeal with the Ninth Circuit Court of Appeals. As you know, filing a notice of appeal would result in an automatic stay of the order. In order to avoid this, and the incurring of additional costs for both parties, we are willing to discuss with you the posting of adequate security for the release of the vessel. During the hearing Mr. Walsh

mentioned a letter of undertaking which we can most likely accept as security provided, of course, that it is issued by the vessel's insurer or P&I carrier or other adequate surety. The amount will of course need to be agreed and is typically about 1.5 times the amount of the claim.

We also note that the Court's order specifically requires your client to maintain insurance on the vessel, as does the mortgage. We have asked for proof of insurance but as of this morning it has not been forthcoming. Can you please fax or email to me immediately the proof of insurance which, again per the mortgage, must name our client as the loss payee. Since under the Mortgage the insurance is "subject to Mortgagee's approval" we need to immediately see the insurance. We also require that you provide "evidence...that all premiums and other charges therefore have been fully paid."

We look forward to your response by return.

Thank you.

Gregory W. Poulos  
Partner  
Cox, Wootton, Griffin, Hansen & Poulos, LLP  
190 The Embarcadero  
San Francisco, CA 94105  
Voice: (415) 438-4600 x201  
Fax: (415) 438-4601  
E-mail: mailto:gpoulos@cwahp.com  
Website: <http://www.cwahp.com>

\*\*\*\*\*  
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*****  
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| "Fanger, Gwen" |  
| <GwenFanger@dwt.c|  
| om> |  
| |  
| 08/20/2007 09:38 |  
| AM |  
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```

Y-----

To: <mkelley@cwghp.com>, "Walsh, James"  
<budwalsh@dwt.com>  
cc: "Mark Holmes" <MHolmes@mckassonklein.com>,  
<gpoulos@cwghp.com>  
Subject: RE: Release of the Point Loma

Mr. Kelly,

Could you please let us know when your surveyor plans to be at SugarDock to inspect the vessel today. We would like to arrange to have someone be there as well.

Thank you.  
Gwen

-----Original Message-----

From: mkelley@cwghp.com [mailto:mkelley@cwghp.com]  
Sent: Friday, August 17, 2007 7:10 PM  
To: Fanger, Gwen; Walsh, James  
Cc: Mark Holmes; gpoulos@cwghp.com  
Subject: Release of the Point Loma

Please see the attached correspondence.

(See attached file: Walsh re release of vessel 081707.doc)

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